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April 21, 2010

Mr. Jack Miller
County of San Diego
Department of Environmental Health
Local Enforcement Agency
1255 Imperial Avenue
San Diego, California 92101



Re: **Comments on the Addendum to the Certified Final Environmental Impact Report for the Proposed Gregory Canyon Landfill**

Dear Mr. Miller:

These comments are provided on behalf of the Pala Band of Mission Indians on the "Addendum to the Certified Environmental Impact Report" ("Addendum") for the proposed Gregory Canyon Landfill ("Project") made public in January of this year. The Addendum was prepared to analyze the impacts of obtaining new sources of water for the proposed Project following the decision by the Olivenhain Municipal Water District to terminate its agreement to sell water to Gregory Canyon Ltd. ("GCL").

Unfortunately, the County determined that this analysis of the important issues raised by the need for new sources of water for the Project would not be improved by allowing public comment. That resulted in an inadequate analysis of the impacts of the proposed changes in the Project. After reviewing the Addendum and considering recent changes in California laws related to greenhouse gas emissions and fire safety, we have concluded that the analysis in the Addendum was inadequate for a number of reasons, including for the reasons discussed below. Given those inadequacies, the substantial changes in the Project and the circumstances under which the Project is undertaken and the new information that identifies new significant effects, the County should prepare a subsequent or a supplemental EIR for the Project and allow the public an opportunity to comment on that analysis.

I. The Addendum Failed to Analyze the Impacts of Obtaining Pre-Moisturized Clay for the Liner.

The Addendum claims that water demand at the proposed landfill can be reduced by "pre-moisturizing" clay for the liner at the clay mine, which the Addendum identifies for the first

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time as the Pacific Clay Products, Inc. Mine in Lake Elsinore, California. The Addendum includes a non-binding proposal from the company to supply the pre-moisturized clay as well as gravel for the proposed Project. The Addendum concludes that pre-moisturizing the clay at the mine site would reduce water demand at the proposed landfill site by 125,000 gallons per day (“gpd”).

But, the Addendum fails to identify and analyze a number of impacts. First, there is no discussion regarding (1) the amount of water that would be needed to prepare the clay for trucking (to “over-moisturize” the clay), or (2) the source of the water for that process. If the proposed project water use would be reduced by 125,000 gpd, and the clay is being over-moisturized, the amount of water needed must be higher, but that fact is not discussed. Without some discussion of the amount and source of the water needed, the Addendum could not analyze how the use of that significant amount of water at the Pacific Clay Mine could impact other water users in the Lake Elsinore area. We note that footnote 5 of the Addendum claims that there are “numerous sources” of clay available in Southern California, but that information is not found in Appendix D or E as claimed. If another source of clay would be used, the impacts related to obtaining the material from that site should be analyzed.

In addition, the Addendum contained no description of the mine itself or of the process that would be used to mine and then “over-moisturize” the clay. Consequently, there was no analysis of the potential impacts to water quality from these processes. The Addendum also failed to analyze traffic, air quality, or noise impacts in the area from mining, moisturizing, and trucking the approximately 650,000 cubic yards of clay and 110,000 cubic yards of gravel that would be needed for the proposed landfill. No analysis was provided of the greenhouse gas (“GHG”) emissions that would be caused by mining the clay and trucking the wet clay and gravel.

More troubling is the fact that the Addendum simply assumes that pre-moisturizing the clay at the mine to between four to six percent “above the optimum moisture content” would have no impact on the quality of the liner. There is no discussion of the quality assurance at the mine site to ensure that optimum moisture content has been achieved, given that clay does not easily take or give up water content. Although Pacific Clay represents that it currently moisturizes clay used to manufacture fire brick at its facility, there is no evidence that Pacific Clay ever has pre-moisturized clay for purposes of constructing a landfill liner or that pre-moisturizing clay for a landfill has been done anywhere in Southern California. That is critical information that should have been included and analyzed in the Addendum, and as the pre-moisturizing of the clay constitutes a significant change in the project, further analysis and comment was required under CEQA Guidelines Sections 15162 or 15163.

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II. The Addendum Failed to Analyze the Impacts of Using Soil Sealants in Areas Designated as Critical or Important Habitat for Endangered Species.

The Addendum also claims that water demand would be decreased by the use of soil sealants on unpaved roads. The Addendum also claims that use of the soil sealant “SOILTAC” would not affect water quality because “project components are designed so that runoff would not discharge directly to the river” and “areas in which the soil sealant would be applied are not located within close proximity to the river.” (Addendum at pg. 37). But the Addendum did not identify where the soil sealants would be used, and the fact that a number of unpaved roads on the site are close to the San Luis Rey River raises questions about the basis for those assertions.

The Addendum also claimed that there would be no water quality impacts because laboratory test data for SOILTAC show “no detection of pesticides, PCBs, herbicides, or heavy metals, but indicate the presence of vinyl acetate and acetone.” If the sealant contains vinyl acetate and acetone some analysis was required of the potential impact of vinyl acetate and acetone on water quality and species in the area. We note that the Material Safety Data Sheet (“MSDS”) for the SOILTAC product included in the Addendum contains no information on acute eye, oral, skin, or inhalation toxicity, but specifically identifies first aid measures for eye contact, skin contact, inhalation or ingestion. The MSDS directs that such exposures be addressed immediately.

Given that the MSDS directs users of the product to limit skin contact and oral ingestion, the Addendum should have analyzed the impact of applying the sealant on property, especially in areas where the endangered arroyo southwestern toad and other species have been found. The MSDS does include information on ecotoxicity, but there is no discussion of impacts to amphibians or other species. Some analysis of that important issue was required under CEQA.

III. The Analysis in the Addendum of Claimed Riparian Water Rights Was Inadequate.

The Addendum asserts that one of the new sources of water would be water from the Pala Basin alluvial aquifer that would be diverted on the basis of a claimed riparian water right. There are a number of reasons why the analysis of this issue in the Addendum was inadequate.

First, footnote 2 of Appendix G to the Addendum acknowledges that, when the South Coast Land Company (“SCLC”) sold a number of the riparian parcels in 1913, SCLC reserved the right to use all water developed on the parcels in excess of the amount of water needed for use on the Properties. The deed states that the new owner retained the right to use the riparian water “necessary for irrigation, domestic and stock purposes” on those riparian parcels. (Exhibit A.)

That provision in the 1913 grant deed forever severed the riparian rights from the land, except for that amount necessary for irrigation, domestic and stock purposes. (*Carlsbad Mutual*

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Water Co. v. San Luis Rey Development Co. (1947) 78 Cal.App.2d 900, 913; *Forest Lakes Mutual Water Co. v. Santa Cruz Land and Title Co.* (1929) 98 Cal.App. 489, 496). The proposed landfill would not use water for any of the listed purposes. Moreover, because the grant burdened the land with the limits on water use, the claims in Footnote 2 that (1) there is no evidence that the rights reserved by the seller were used, or (2) even if the water reserved by SCLC had been used, those rights “would be subordinate to riparian rights” are both wrong and irrelevant. It should be noted that, as discussed in the *Carlsbad Mutual Water* case, SCLC was involved at the time in purchasing land and water rights for both downstream and upstream diversions, including the construction of Lake Henshaw. Consequently, the facts appear to show that the water was used by SCLC and/or its successors-in-interest.

Second, the analysis in the Addendum claims that parcels that were riparian when the initial grant was made from the public domain retain those rights even if a subdivided parcel is no longer riparian. By law, where a parcel is conveyed by a deed “that is silent as to riparian rights, the conveyed parcel is forever deprived of its riparian status.” (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 538). This rule is particularly pertinent to original Grant No. 6, which includes current Parcels 9 and 10 (App. G, Figure 1). The claim that the “whole of the property remained intact through numerous conveyances” is not supported by the evidence. Parcels 9 and 10 are separate parcels with different assessor’s parcel numbers. Because the Addendum shows that Parcel 9 is not riparian to the alluvial aquifer, it no longer has any riparian rights.

Third, the claim that Parcel 10 is riparian to the alluvial aquifer also is questionable. Figure 5 of Appendix F of the Addendum claims to show the extent of the alluvial aquifer on the parcel, but that description is based on field surveys, not on a subsurface investigation. In fact, Figure 5 directly conflicts with the extent of the alluvial aquifer identified on Plate 1 in the Joint Technical Document (“JTD”) titled “Geology, Hydrogeology and Geotechnical Analyses” by GeoLogic Associates, dated May 2003, and Figure 2-3A of the JTD. Those maps clearly show that, at the farthest, the “finger” of alluvium in the area identified in Figure 5 of Appendix F pinches out before the 330-foot contour and does not reach to the 370-foot contour as claimed on Figure 5. That is a significant spatial difference that leaves the extent of the alluvium far outside the boundary of Parcel 10, and raises serious questions about the use of surface investigations to define the limits of the alluvial aquifer.

The same problem plagues the assertion that the northwest corner of Parcel 10 abuts the alluvial aquifer. Again, that claim is based solely on surface investigations and is suspect given that the boring log for Well GLA-14, which is very near that corner, shows that the water-bearing area is in an area below weathered bedrock, not in the alluvium.

Given all these problems with the analysis in the Addendum of these claimed riparian rights, further CEQA analysis is required. Prior that analysis being completed, however, additional subsurface field investigations must be conducted to confirm that Parcel 10 actually is riparian to the alluvial aquifer and that the aquifer is water-bearing in that area.

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IV. The Addendum Failed to Analyze the Impacts of Piping Any Pumped Groundwater.

In addition to the use of seven point-of-compliance monitoring wells to supply water to the proposed Project, the Addendum identifies (1) three wells located on the former Lucio Dairy on the north side of the San Luis Rey River where groundwater would be pumped from the alluvial aquifer and (2) three new percolating groundwater wells that would be located in Borrow Area B and Borrow Area A “watersheds” and in an area north of State Route 76 as on Figure 1 of Appendix H. Figure 1 shows the proposed routes for pipelines from these wells to water tanks to be located near the facilities area and in Borrow Area B, which are both on the south side of the river. Although the Addendum claims that the construction and maintenance of these pipelines would not cause any impacts, the analysis of the issue is superficial and relies on the argument that the pipelines would be installed in disturbed areas.

But it is clear that the pipeline from the groundwater well proposed for the north side of State Route 76 would have to be installed under State Route 76. Some analysis of the impacts to the road and traffic from that construction should have been included. In addition, that pipeline and the separate pipeline for the Lucio “riparian” wells (there would be two pipelines to separate riparian water from percolating groundwater) would have to cross the San Luis Rey River to reach the water tanks on the south side of the river. Even so, there was no discussion regarding the impacts of installing these pipelines through the river.

In addition, Figure 1 shows that these pipelines as well as the pipeline from the proposed Borrow Area A well would have to cross the San Diego County Water Authority Aqueduct. Again, there was no discussion of the impacts of installing these pipelines on the Aqueduct. All of these areas also are within critical habitat and habitat for the endangered arroyo toad. Because the Addendum failed to analyze the impacts of the pipelines on the river, the Aqueduct, and species, it violated CEQA.

Under state law, percolating groundwater is appurtenant to the land, and can only be used on the overlying parcel from which the water is pumped. (*See, e.g., California Water Service Co. v. Edward Seeborn & Son, Inc.* (1964) 224 Cal.App.2d 715, 725). That contradicts with the assumption in the Addendum that groundwater pumped from the three proposed percolating groundwater wells could be used anywhere on the site.

Worse, the Addendum claims that the “safe yield” of these three new wells is 22.8 acre feet of water per year (7.4 million gallons) even though no wells have been drilled in or near any of the three “basin” areas. Rather, as discussed in Appendix H, the Addendum simply assumes that the areas would receive 25 inches of rain annually and that a portion of that water would infiltrate to the bedrock system. Not only is the rainfall assumption not supported by any evidence, but the lack of any hydrogeologic data on the amount of water these wells could produce makes the wells an illusory source of water that cannot be used to assume that there is an adequate source of water on the site.

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V. The Impacts of Pumping Water From the Lucio Dairy Wells Was Inadequate Because the Wrong Baseline Was Used.

The Addendum claims that pumping groundwater from the Lucio Dairy wells would have no impact because the amount pumped would be less than the historic amount pumped on the site. But the analysis of the impacts of pumping should have been based on current uses on the site. The fact is that no water currently is being pumped from the site and has not been pumped for approximately eight years.

Under CEQA, the impacts of a project must be compared “to the actual environmental conditions at the time of CEQA analysis” and must assess “the ‘existing physical conditions in the affected area’ [citation omitted] that is, the ‘real conditions on the ground’ [citations omitted].” (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 at *4). Water pumping amounts from eight or more years ago do not establish a proper baseline under CEQA for current conditions. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 89, 126).

In addition, claiming that the proposed pumping would cause no impacts based on the amount of water stored in the entire Pala Basin aquifer and the alleged “safe yield” of that aquifer ignores the need to assess impacts in the “affected area.” Also, under the riparian doctrine, all riparian owners are entitled to a proportional share of water (*see, e.g., Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 753), so some analysis was needed of how this new pumping could impact current uses.

In addition, some analysis is needed of the impacts of pumping at the proposed rate on existing habitat, on species especially the arroyo toad, on the ability to create mitigation areas based on water levels, and on surface flows in the river. Other localized effects could include subsidence and impacts on the access road. The failure to even consider these impacts violated CEQA.

VI. The Addendum Failed to Consider the Legal Limitations on the San Gabriel Valley Water Company’s Sale of Recycled Water.

The Addendum also claims that recycled water for the proposed Project would be obtained pursuant to a “Recycled Water Agreement” between the San Gabriel Valley Water Company (“SGVWC”) and GCL dated September 30, 2009. (“GCL Agreement”). Under the GCL Agreement, water would be obtained from the SGVWC facility in El Monte, California, east of Los Angeles, and then trucked 90 miles to the proposed landfill site. SGVWC is a privately owned utility regulated by the California Public Utilities Commission (“CPUC”). What the Addendum fails to discuss, however, are the agreements under which SGVWC obtains this recycled water and the conflicts between the terms of the GCL Agreement and those other agreements.

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Specifically, the SGVWC's source of recycled water is the Whittier Narrows Water Reclamation Plant operated by the Los Angeles County Sanitation District ("Sanitation District"). The Sanitation District sells recycled water to the Upper San Gabriel Valley Municipal Water District ("Upper District") pursuant to that "Agreement for Purchase and Sale of Reclaimed Water" dated January 12, 2005 (the "2005 Agreement") (Exhibit B). The Upper District then sells a portion of that water to SGVWC pursuant to the "Whittier Narrows Agreement dated June 27, 2006 ("2006 Agreement") among the Upper District, SGVWC, and the Los Angeles Department of Parks and Recreation ("LADPR"). The 2006 Agreement is attached as Exhibit C.

Section 8.2 of the 2005 Agreement requires that the Upper District "oversee any and all sites that receive reclaimed water from Upper District, and to ensure, by agreement, ordinance, or other such administrative mandate, that each site using reclaimed water from the water reclamation plant does so in accordance with the rules, regulations, guidelines and any other pertinent criteria for such use mandated by the Department and/or other regulatory agencies with appropriate jurisdiction." That provision also states that the Upper District must provide the Sanitation District with a copy of the Upper District's plan to inspect sites where the reclaimed water would be used, and required that the Sanitation District and its Board approve any new or extended portions of the Upper District's reclaimed water distribution system. The Addendum does not mention these requirements or show that they have been satisfied. Appendix B to the 2005 Agreement includes State Water Resources Control Board Order No. 88-107, which only allows reclaimed water from the Whittier Narrows Reclamation Plant to be used "within the San Gabriel Valley Hydrologic Subunit." The proposed landfill site is not within that subunit.

The Addendum also conveniently fails to mention that Section 2.1.6 of the 2006 Agreement states the SGVWC's sale of recycled water to third parties other than the LADPR must be pursuant to a separate agreement between the Upper District and SGVWC. In addition, Section 3.1.4 of the 2006 Agreement requires that the Upper District "secure, maintain, and review all requisite permits and approvals for each SGVWC customer utilizing recycled water purchased from" the Upper District. The Addendum does not mention those provisions or provide any evidence that these requirements have been met.

In addition to ignoring these agreements, the Addendum also failed to discuss the fact that because the SGVWC is a CPUC-regulated public utility, any exceptions or deviations to the SGVWC's CPUC-approved tariffs requires approval of the CPUC, and any contract must be authorized by the CPUC before the contract becomes effective. (CPUC Standard Practice U-8-W). For example, CPUC Sheet 19-16-W, dated December 16, 2009, lists SGVWC's sale of recycled water to the LADPR under the "list of contracts and deviations" from SGVWC's standard tariff that were approved by the CPUC. (Exhibit D).

CPUC approval is specifically required where water service is being extended by a CPUC-regulated water company outside of its identified service area. There is no question that

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the proposed Gregory Canyon Landfill site is far outside the SGVWC's CPUC-approved service area. The CPUC rules requires that if the new service territory is more than 2,000 feet from the existing service area, or is not in the same city in which the utility already provides service, the utility must file for formal certification by the CPUC. As an example, the SGVWC requested such a modification on October 13, 2006, to add the LADPR. (CPUC Advice Letter 346, attached as Exhibit E). Case law indicates that a contract is not effective if water service is extended without the approval of the CPUC. (See *e.g.*, *California Water & Telephone Company v. Public Utilities Commission of the State of California* (1959) 51 Cal.2d 478, 501). Failure to address let alone analyze this issue in the Addendum was a violation of CEQA.

The fact is that the GCL Agreement is invalid without CPUC approval. Relying on such a speculative source of water is an improper basis for decision making under CEQA. (*Vineyard Area Citizens For Responsible growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 432).

VII. New CEQA Guidelines Require that the Impacts From Emissions of GHGs From the Proposed Landfill Must Be Analyzed and Circulated for Public Comment.

Revisions to the CEQA Guidelines adopted by the Natural Resources Agency to address the analysis of impacts related to greenhouse gas emissions under CEQA became effective March 18, 2010. CEQA Guidelines Section 15064.4 identifies requirements for determining whether a project would cause significant impacts due to GHG emissions, and new CEQA Guidelines Section 15126.4(c) addresses mitigation measures for GHG emissions. The new rules also discuss how the cumulative impacts of a project's GHG emissions must be assessed. (CEQA Guidelines § 15130). The CEQA Guidelines define the term "greenhouse gas" to include methane, which would be emitted by the proposed landfill, and other pollutants and contaminants that would be emitted by the trucks that would be hauling water and pre-moisturized clay.

The issuance of these Guidelines confirms that GHG emissions constitute a significant adverse affect that must be analyzed under CEQA. No such analysis was provided in the Addendum as to the direct or cumulative impact of the proposed landfill project. Because new information of substantial importance shows that the Project will have one or more significant effects, a subsequent or supplemental EIR must be prepared. (CEQA Guidelines § 15162; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 384-84 (listing of steelhead trout as an endangered species after certification of the FEIR required supplemental analysis of the project). The fact is that the certification of the original FEIR occurred more than seven years ago, making review of that issue even more critical. (See *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 143 (two-year delay after certification raised issue of need for subsequent or supplemental EIR).

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VIII. The Issuance of a Consolidated County Fire Code in November of 2009 Requires That Further Analysis of the Proposed Project Be Completed to Assess Impacts.

Another significant change that affects the proposed Project was the release of the 2009 Consolidated Fire Code for the County of San Diego, which became effective on November 13, 2009. The revision of the Fire Code was completed by the County in response to significant wildfires in October 2003 and 2007. The FEIR had addressed the issue of fire protection by relying on the North County Fire Protection District ("NCFPD") and State and County mutual aid agreements for fire protection and on the fact that a 20,000-gallon water tank would be installed on the site. At least part of the site for the proposed Project appears to be in a very high fire hazard severity zone, and the 2007 Rice Canyon Fire burned just to the northwest of the site.

There has been no analysis of the requirements of the new Fire Code. For example, Section 503.1.2 of the Fire Code requires that areas with dead-end access like the proposed landfill have "turnarounds" at a maximum of 1,320-foot intervals as well as a turnaround within 150 feet of the end of the road. The ability to provide those turnarounds and the impacts of doing so should be analyzed.

Section 508.2 also establishes specific requirements for water reservoirs that would be used to fight fires, especially in areas without centralized service from a water district. Given the size of the proposed Project, the lack of a secure source of water, and the small size of the water tanks proposed for the property, some analysis should be provided regarding whether the storage capacity would meet the requirement of the new Fire Code.

Likewise, the requirements of Section 3301.2 of the new Fire Code governing the use of explosives need to be assessed. Significant blasting would be required to construct the proposed landfill, and some analysis of these Fire Code requirements should be completed in light of that required blasting.

IX. Conclusion

Once again, the County chose to avoid public discussion of these important issues by preparing an Addendum to the RFEIR to avoid public comment. As described above, the result was an inadequate analysis of these critical issues. To rectify that result, we urge the County to prepare a subsequent or supplemental EIR that would address these issues properly and allow for public input.

Sincerely,



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WER/bb

cc: Chairman Robert H. Smith, Pala Band of Mission Indians
Ms. Lenore Lamb, Director, Pala Environmental Services
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Ms. Michelle Moreno, United States Fish & Wildlife Service
Ms. Chiara Clemente, Regional Water Quality Control Board
Mr. Stephen Moore, San Diego County Air Pollution Control District
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